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APR 08 2011

OFFICE OF PETITIONS

In re Application of	:	
Bruce Karl Thor	:	DECISION ON REQUEST
Patent Number: 7,718,705	:	FOR RECONSIDERATION OF
Issue Date: 05/18/2010	:	PATENT TERM ADJUSTMENT
Application No. 10/049427	:	
Filing or 371(c) Date: 05/06/2002	:	
Attorney Docket Number: D4220-78-PUS	:	

This is a decision on the petition filed on November 12, 2010, under 37 CFR 1.705(d), requesting that the patent term adjustment indicated on the above-identified patent be corrected to indicate that the term of the above-identified patent is extended or adjusted by one thousand three hundred thirty-five (1335) days.

The petition to correct the patent term adjustment indicated on the above-identified patent to indicate that the term of the above-identified patent is extended or adjusted by one thousand three hundred thirty-five (1335) days is **DISMISSED**.

A Decision on a Petition under 37 CFR 1.705(d) was mailed October 20, 2010. The Decision stated that the "B" delay period does not include the number of days beginning on the date on which a notice of appeal to the Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31, and ending on the day before the RCE was filed, or 115 days. See, 35 U.S.C. 154(b)(1)(C)(iii). Thus, the "B" delay period is 396 days (511 days – 115 days), not 512 days.

Petitioner files the present petition and avers that the decision is improper in stating that the "B" delay period does not include the number of days beginning on the date on which a notice of appeal to the Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31, and ending on the day before the RCE was filed, or 115 days. Petitioner notes the decisions reliance upon 35 U.S.C. 154(b)(1)(C)(iii). Petitioner asserts that reliance upon 154(b)(1)(C)(iii) is misplaced and improper and in addition, the provisions of 154(b)(1)(C)(iii) have not been satisfied.

Petitioner further asserts that 35 U.S.C. 154(b)(1)(B)(ii) does not apply, and that 35 U.S.C. 154(b)(1)(B)(iii) is similarly inapplicable. Petitioner argues that petitioner is entitled to 511 days of B

delay as calculated from the date that is three years after the date on which the national stage commenced and ending on the date the patent issued, but not including the date on which the RCE was filed.

Petitioner's arguments have been carefully considered. A review of the Decision on petition, mailed October 20, 2010, reveals that the Decision improperly cited to 35 U.S.C. 154(b)(1)(C)(iii) to support the assertion that the "B" period does not include the number of days beginning on the date on which a notice of appeal to the Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31, and ending on the day before the RCE was filed, or 115 days. The correct citation is 35 U.S.C. 154(b)(1)(B)(ii).

Petitioner avers that 35 U.S.C. 154(b)(1)(B)(ii) does not apply, and that 37 CFR 41.35 acknowledges that jurisdiction does not pass to the Board until all briefs and examiner's answer have been entered. Petitioner is directed to 37 CFR 1.703(b), which provides that *the period of adjustment of the term of a patent* shall not include the period equal to the sum of the following periods: (1) The period of pendency consumed by continued examination of the application under 35 U.S.C. 132(b) (35 U.S.C. 154(b)(1)(B)(i)); (2) the period of pendency consumed by interference proceedings (35 U.S.C. 154(b)(1)(B)(ii)); (3) the period of pendency consumed by imposition of a secrecy order (35 U.S.C. 154(b)(1)(B)(ii)); and (4) *the period of pendency consumed by appellate review under 35 U.S.C. 134¹, 141, 145, whether successful or unsuccessful (35 U.S.C. 154(b)(1)(B)(ii))*. (Emphasis supplied).

In view of the foregoing, the Office did not include in the "B" period the number of days beginning on the date on which a notice of appeal to the Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31, and ending on the day before the RCE was filed, or 115 days, and the "B" delay period is 396 days (511 days – 115 days).

Nothing in this decision shall be construed as a waiver of the requirement of 35 U.S.C. 154(b)(4) that any civil action by an applicant dissatisfied with a determination made by the Director under 35 U.S.C. 154(b)(3) be filed in the United States District Court for the District of Columbia within 180 days after the grant of the patent.

Telephone inquiries specific to this matter should be directed to the undersigned at (571) 272-3232.

/DLW/

Derek L. Woods
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Office of Petitions

¹ 35 U.S.C. 134, Appeal to the Board of Patent Appeals and Interferences, states: (a) PATENT APPLICANT. — An applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the Board of Patent Appeals and Interferences, having once paid the fee for such appeal.